

Area-Based Management of Marine Resources

A Comparative Analysis of the National Marine Sanctuaries Act and Other Federal and State Legal Authorities

Executive Summary

The oceans face serious threats ranging from habitat degradation to declining fisheries to the effects of climate change. Analysts have concluded that ecosystem-based management tools like marine protected areas and marine reserves are important for protecting the United States' marine resources from these threats and for preserving the oceans' benefits for current and future generations. The success of spatially-explicit protected areas depends on involving stakeholders in the process to site, regulate, and manage the protected areas.

While many ocean resource laws have or might be used to provide spatial protections, the National Marine Sanctuaries Act (NMSA) stands apart in offering the kind of management regime needed to preserve ocean resources.¹ Indeed, when enacting the NMSA in 1972, Congress intended to create a comprehensive management system for the entire marine environment that balanced preservation and human activities. To achieve this goal, the NMSA provides for setting aside marine areas for permanent protection and long-term management as national marine sanctuaries.

This report provides an overview of the NMSA and other domestic legal mechanisms for preserving marine ecosystems, including federal authorities, state laws, and the common law of torts. The report also identifies the primary goals of these authorities, discusses how each authority helps protect and conserve marine ecosystems, and considers their shortcomings. The authorities addressed do not constitute an exhaustive list of laws governing the marine environment; rather,



Photo courtesy of Tane Casserley.

they represent those that are most important today. Additionally, although international law is beyond the scope of this report, it is important to note there are a variety of international laws and treaties that are relevant to ocean protection, including the 1982 United Nations Convention on the Law of the Sea;² the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978;³ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.⁴

In comparing the NMSA to other existing laws in the United States, we conclude that the NMSA deserves renewed attention as a unique and powerful ocean conservation tool. Unlike most ocean resource laws, which have a narrow focus on coastal resources, marine mammal protection, offshore mineral extraction, fisheries management, or invasive species, national marine sanctuaries take a different approach: They protect our most valued ocean places, along with the natural, historical, and cultural resources that make them worth preserving.

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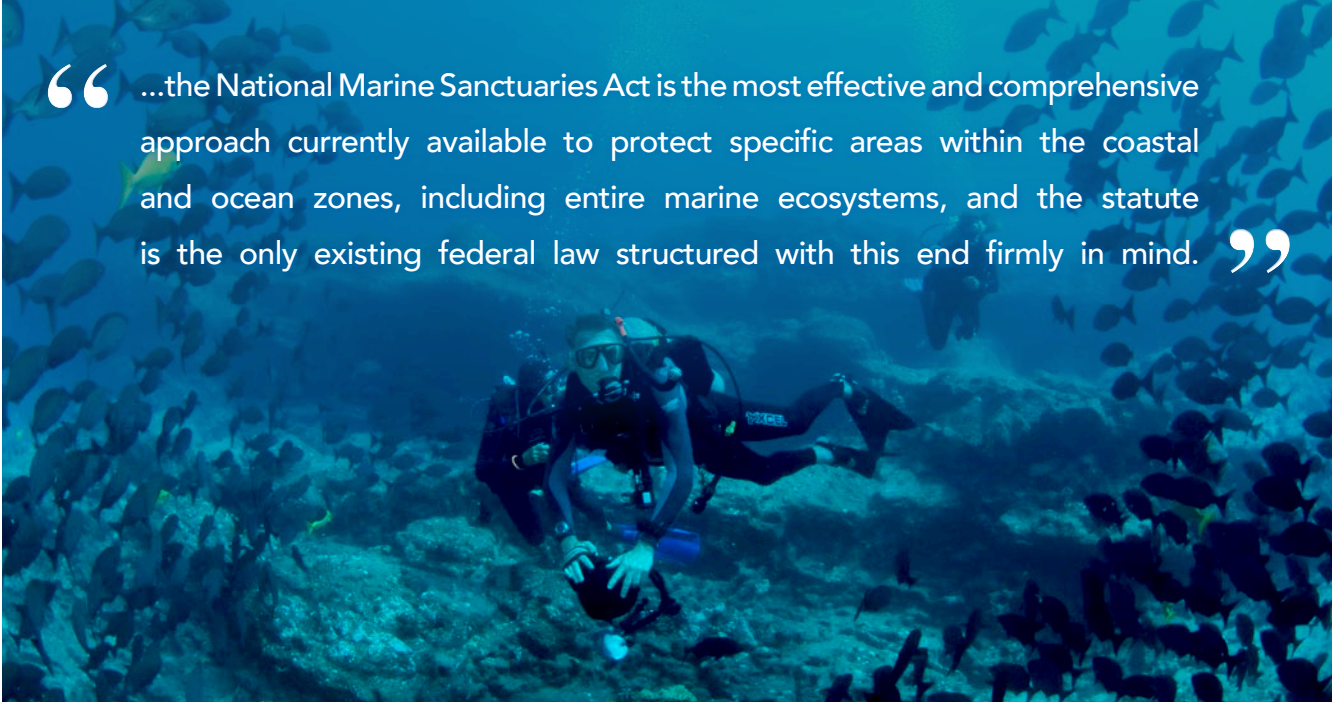


Photo courtesy of NOAA.

The NMSA has several advantages over other authorities in establishing, protecting, and managing specific geographic areas. First, the NMSA creates the authority to apply a comprehensive, ecosystem-based approach to solving problems of ocean degradation and conflicting uses. In contrast, use-based authorities such as the Outer Continental Shelf Lands Act and the Magnuson-Stevens Fishery Conservation and Management Act focus primarily on offshore oil and gas development, and fisheries management, while species-based authorities such as the Endangered Species Act and the Marine Mammal Protection Act aim to protect and revive individual species. Similarly, federal authorities focused on aquatic invasive species are extremely focused and incapable of implementing comprehensive, ecosystem-based management. The NMSA’s systematic approach to sanctuary designation is also preferable to state-based management plans, or coastal authorities such as the Coastal Barrier Resources Act (CBRA), the Coastal Zone Management Act, and provisions in the Clean Water Act. While these authorities aim to protect and manage the coastal environment, they by definition have limited jurisdictional authority relative to the NMSA. For their part, courts are reluctant to assert their jurisdiction and use tort law to advance broad policy goals like reversing ocean degradation.

Second, despite the NMSA’s primary goal of preservation, national marine sanctuaries allow for various compatible uses, including fishing, boating, diving, and other forms of human activity. Unlike federal authorities governing other classifications of protected areas, such as national parks and wilderness areas, which generally apply significant restrictions on human activities, the NMSA facilitates lawful public and private sanctuary uses that are compatible with resource protection. The availability of this multiple-use approach engages the public and reinforces the scientific, cultural, and historic value of marine sanctuaries.

Third, the NMSA provides comprehensive law enforcement authority to the Secretary of Commerce to enforce the protections accorded to marine sanctuaries. The NMSA allows for civil penalties, enabling enforcement without involving federal prosecutors. Some other marine environment legal authorities, like Executive Order 13,158 on Marine Protected Areas, fail to establish any formal accountability—in this case, for federal agencies that fail to comply with the order. Similarly, the CBRA does not provide comprehensive oversight of the various agencies covered by the statute’s prohibition on providing financial assistance to property owners in CBRA-designated areas.

Other laws, like the Endangered Species Act and the Marine Mammal Protection Act, only provide enforcement authority for activities that result in injury to constituent elements of the marine environment, like the individual members of protected species. The NMSA, by contrast, extends its prohibitions and enforcement authority to all components of the sanctuary area.

Finally, the NMSA provides for significant stakeholder involvement. The statute includes extensive opportunities for public participation, from the time a sanctuary is considered for designation through its ongoing management as a protected area. This degree of participation ensures that sanctuaries are compatible with other nearby uses and are effectively managed, and that sanctuary-specific regulations are meaningful and enforceable.

Despite these strengths, the NMSA, as currently drafted and implemented, is not without its flaws. The NMSA's requirement for extensive coordination between federal, state, and local agencies and stakeholders, all of which have competing and sometimes incompatible goals, may stall or altogether derail sanctuary designations. More importantly, over the past decade, no new sanctuary designations have been made, congressional action has had the practical effect of placing a moratorium on new designations, and the National Oceanic and Atmospheric Administration has been faced with chronic underfunding.



Photo courtesy of Claire Fackler.

Even with these shortcomings, the NMSA is the most effective and comprehensive approach currently available to protect specific areas within the coastal and ocean zones, including entire marine ecosystems, and the statute is the only existing federal law structured with this end firmly in mind. Further, sanctuary management is wholly consistent with the principles of the Obama Administration's National Ocean Policy. The policy reflects recommendations made by the Interagency Ocean Task Force, including a proposed shift away from use-based laws and toward ecosystem-based management of marine resources, as well as increased stakeholder involvement to ensure that ocean management considers the needs of those impacted by new policies. As this report details, the NMSA has substantial promise to advance both of these goals and is better suited to this task than other existing authorities.

¹ The NMSA also applies to the Great Lakes. For purposes of this report, references to the ocean conservation tools of the NMSA should be understood to include the Great Lakes.

² U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

³ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319 (entered into force Oct. 2, 1983); Int'l Maritime Organization, Summary of International Convention for the Prevention of Pollution from Ships (MARPOL), [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx) (last visited Nov. 25, 2012).

⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 (entered into force July 1, 1975).

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